# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 8 |
| Appendix | 9 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180 | 6 |
| *Monjon, In re*, 113 F. (2d) 535 | 6 |
| *Wright* v. *Union Central Ins. Co.*, 311 U. S. 273 | 5, 6 |
| Statute: | |
| Bankruptcy Act: | |
| Section 70 (b) (11 U. S. C., Sec. 110 (b)) | 4 |
| Section 75 (s) (3) (11 U. S. C., Supp. V, Sec. 203 (s) (3)) | 9 |




314863—41

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 914

HACEL W. NALDER, BANKRUPT, PETITIONER

*v.*

THE FEDERAL LAND BANK OF BERKELEY AND FEDERAL FARM MORTGAGE CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court (R. 9) is not reported. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 23–28) is reported in 116 F. (2d) 1004.

### JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was entered on January 2, 1941 (R. 28). The petition for a writ of certiorari was filed on April 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether, under Section 75 (s) (3) of the Bankruptcy Act, a debtor not choosing to pay the appraised or reappraised value of his property is entitled to have it sold at public auction, with 90 days to redeem, or whether the court may order it sold without a redemption period or abandoned as burdensome.

## STATUTE INVOLVED

Section 75 (s) (3) of the Bankruptcy Act is set out in the Appendix.

## STATEMENT

Respondents, the Federal Land Bank of Berkeley and the Federal Farm Mortgage Corporation, hold debts secured by real estate mortgages on property owned by petitioner. In October 1938, petitioner filed a petition under Section 75 of the Bankruptcy Act, seeking to effect a composition or extension of his debts, including his indebtedness to the Federal land bank and the Federal Farm Mortgage Corporation. Thereafter, he amended his petition and was adjudicated a bankrupt under subsection (s) of Section 75. His property was appraised (R. 16–17); a rental on the property was fixed (R. 17–18); his exemptions set aside to him (R. 17); and on April 26, 1939, a three-year stay order was entered by the District Court (R. 17).

Upon petitioner's failure to pay the rental, the Federal land bank and the Federal Farm Mort-

gage Corporation, on May 23, 1940, filed a petition requesting the District Court to order the appointment of a trustee and the sale or other disposition of the property covered by their real estate mortgages (R. 1–4). On June 29, 1940, the District Court ordered the appointment of a trustee to sell or otherwise dispose of the property (R. 4–5). A trustee was appointed on July 11, 1940 (R. 6), and he filed his report on August 17, 1940, in which he found (1) that the reasonable value of the property was not in excess of $7,066; (2) that the valid existing and unpaid liens against the property exceeded $7,100; and (3) that there was no equity in the property for the benefit of petitioner or of any general creditor (R. 8–9). The trustee recommended that the property be released from the jurisdiction of the bankruptcy court and that the mortgage holders be free to take action for the enforcement of their liens (R. 8).

The Federal Land Bank and the Federal Farm Mortgage Corporation filed a motion requesting that the property be abandoned as burdensome to the estate. On October 21, 1940, the district court denied this motion and ordered the trustee to sell the property at public auction, subject to redemption by petitioned within 90 days (R. 10–12).

Upon appeal by the Federal Land Bank and the Federal Farm Mortgage Corporation, the United States Circuit Court of Appeals for the Tenth Circuit reversed this order of the district court (R.

28). The circuit court of appeals held: (1) petitioner should first be given an opportunity to acquire the property free and clear of encumbrances by paying into court its value as fixed in the proceedings; (2) if he failed to avail himself of this right, the district court should then determine whether there was a reasonable probability of realizing from the sale of the property any surplus over the encumbrances for the benefit of general creditors or petitioner; (3) if there was such a probability, the district court should order a sale pursuant to the provisions of Section 70 (b) of the Bankruptcy Act (11 U. S. C., Sec. 110 (b)), without a right of redemption; and (4) if there was not such a probability, the district court should order the property abandoned by the trustee as burdensome.

## ARGUMENT

Petitioner contends that under Section 75 (s) (3) of the Bankruptcy Act he is entitled to have his property sold at public auction, with a right to redeem the property within 90 days thereafter. This claim disregards the wording of the statute and is not supported by any decision.

Section 75 (s) (3), set out *infra*, p. 9, provides initially that at the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property. Then follow two provisos. The first is that "upon request of any * * * creditor, or * * * of the debtor, the

court shall cause a reappraisal of the debtor's property, or * * * after * * * hearing, fix the value of the property, * * * and the debtor shall then pay the value so arrived at into court * * *." The second proviso provides that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction." The subsection concludes with the sentence: "If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

In *Wright* v. *Union Central Ins. Co.*, 311 U. S. 273, relied on by petitioner, the Court held that the right conferred upon the debtor by the first proviso, to acquire the property by paying its redetermined value, cannot be defeated by a request of a secured creditor for a public sale under the second proviso or by disposal of the property by court order under the last sentence of the subsection. Pursuant to that decision the court below carefully preserved petitioner's right under the first proviso to redeem at a reappraised value (R. 27–28). What petitioner seeks is not that right, but a public sale under the second proviso, with a 90-day redemp-

tion period.[1] The statute, however, confers no option upon the debtor of calling for a public sale, but only upon secured creditors. Here no creditor has asked for a public sale, and the last sentence of subsection (s) (3), under which the property is to be disposed of unless petitioner asks for a reappraisal, contains no reference to a public auction or to a right of redemption. Instead, it contemplates that upon a failure of the debtor to comply with orders of the court, such as the order here for the payment of rental, the debtor's estate shall be administered and liquidated in the same way as any other estate in bankruptcy. Under the provisions of the general Bankruptcy Act, of course, a trustee may be authorized to sell property without

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[1] *In re Monjon*, 113 F. (2d) 535 (C. C. A. 7th), also cited by petitioner as in conflict with the decision below, does contain some language inconsistent with the decision below as to the power of the court to dispense with sale and confirm title in the creditor. Apparently the Seventh Circuit thought that under Section 75 (s) (3) mortgaged property might be disposed of only (1) by payment of the appraised or reappraised value by the debtor, or (2) by public auction if a secured creditor demanded it. This view appears, however, to have been connected with the court's holding that the right of a secured creditor to a sale at public auction was superior to the debtor's right to buy at a reappraised price, and that construction of the Act was overturned by this Court in the *Union Central Ins. Co.* case, *supra*.

*John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180, also relied upon by petitioner, has no especial relevance to this case. It held that a debtor's petition under subsection (s) of Section 75 might not be dismissed upon the ground that there was no reasonable probability of the debtor's rehabilitation.

any right of redemption or to abandon as burdensome property lacking in any equity for the debtor or for general creditors.[2]

It is apparent, moreover, that the decision below does not in reality operate to any substantial detriment of petitioner, by failing to order a public sale with a 90-day redemption period. Neither a sale of the property without a redemption period nor its abandonment is authorized unless and until petitioner fails to avail himself within a reasonable time of his right to acquire the property by paying its appraised value into court. If petitioner does so fail no purpose would be served by affording him an additional 90-day redemption period. There is no limitation on the right of a mortgagee to bid the full amount of his claim at a public sale, so that it would in all likelihood be more expensive for the debtor to redeem from a public sale than to acquire the property in the first instance by paying its appraised value into court.

Nor would petitioner be injured if, subject to the conditions laid down by the decision below, the trustee should be authorized to abandon the property rather than to sell it at public sale. By abandonment the bankruptcy court merely relinquishes

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[2] There can be no doubt that the phrase "as provided for in this Act" in the last sentence of subsection (s) (3) must be taken to refer to the Bankruptcy Act as a whole, and not merely to Section 75. The sentence contains two references to "this section," and it is accordingly clear that when the word "Act" is used it means something more than "section."

its exclusive jurisdiction over the property and the mortgagees are permitted to foreclose their security. If that course should be followed, the debtor would, under state law, have a redemption period well in excess of the 90 days for which he contends.

## CONCLUSION

The decision below is plainly correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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MAY 1941.